EXHIBIT 32
DATE 3/26/09
SB 406

SENATE BILL 406:

A Referendum to the People of Montana to Amend Article II, Section 3, Declaration of Rights, Defining Person

Senator Dan McGee – March 13 19, 2009

1. SB 406 proposes a referendum to the people of Montana to amend their Constitution.

2. SB 406 proposes to amend Article II, Section 3, Inalienable rights:
"All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basis necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

to add:

"For the purposes of this Article, person means a human being at all stages of human development of life, including the state of fertilization or conception, regardless of age, health, level of functioning, or condition of dependency."

3. The People of Montana have the exclusive right to amend their Constitution.
   a. Article II, Section 1: Popular Sovereignty: *"All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."*

   b. Article II, Section 2, Self-government: *"The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary."*

4. **Legal Background:**

   a. **Declaration of Independence:**

*"We hold these truths to be self-evident – **that all men are created equal; that they are endowed by their Creator with certain inalienable rights** – that among these are **life,** liberty and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the People to alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness."*

b. U.S. Constitution, Amendment 14, Section 1 (1868):

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; ***nor shall any state deprive any person of life****, liberty, or property, without due process of law,* ***nor deny to any person within its jurisdiction the equal protection of the laws.***

(in 1868, the issue being addressed was slavery, not the question of when life began)

c. Black's Law Dictionary – Definition of Person:

- *"In general usage, a human being (i.e. natural person)..."*
- *"Unborn child. Word 'person' as used in the Fourteenth Amendment does not include the unborn (per Rove v. Wade)...Unborn child is a 'person' for purposes of remedies given for personal injuries, and a child may sue after his [her] birth."*

d. Montana Constitutional Convention, 1972, Verbatum Transcript, page 1640

- Delegate Kelleher proposes amendment to Art. II, Sec. 3, to change the word 'born' for 'conceived'.
- Delegate Dahood opposes the proposed amendment, and states: *"Mr. Chairman, I stand in opposition to the amendment. What Delegate Kelleher is attempting to do at this time is, by constitutional command, prohibit abortion in the State of Montana. That issue was brought before the committee. We decide that we should no deal with it within the Bill of Rights.* ***It is a legislative matter insofar as we are concerned. The world of law has for centuries conducted a debate as to when a person becomes a person, at what particular state, at what particular time; and we submit that this particular question should not be decided by this delegation****. It has no part at this time within the Bill of Rights of the Constitution of the State of Montana, and we oppose it for that reason." (*emphasis added).
- The Kelleher amendment was then defeated.

e. Roe v. Wade, 1973

- *"State criminal abortion laws...violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy."*

- *"Though the state cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grow and reaches a "compelling" point at various stages of the woman's approach to term."*

- *"For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion, except...for the preservation of the life or health of the mother."*

f. Doe v Bolton, 1973

- *"Pregnant woman does not have absolute constitutional right to abortion on her demand."*

g. Webster v. Reproductive Health, 1989

- *"This court has emphasized that Roe implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion."*

- *"...this court upheld governmental regulations withholding public funds for non-therapeutic abortions but allowing payments for medical services related to childbirth, recognizing that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate Roe v. Wade."*

- Reiterates: "*...state's interest in protecting potential human life." (Pp 15-23)*

- Viability: "*...as the point at which its interest in potential human life must be safeguarded."*

- Emphasized maternal health

- *"There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability."*

- *"The doubt cast on the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that Roe's rigid trimester analysis has proved to be unsound in principle and unworkable in practice."* (Pp 19-21)

- *The Roe framework is hardly consistent with the notion of a Constitution like ours that is cast in general terms and usually speaks in general principles. The framework's key elements – trimesters and viability – are not found in the Constitution's text, and since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.* ***There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability. Thus, the Roe trimester framework should be abandoned."*** (Pp19-21) (emphasis added)

h. Planned Parenthood v. Casey

a. Addresses Viability, state's legitimate interests, and informed consent
b. Paragraph. No. 14 – discussion on effects of overturning Roe v. Wade – see handout

i. **Montana Case Law – State Supreme Court Decisions:**

- Armstrong V. Mazurek, 98-066, 1999 MT 261, ppg 44:
"Significantly, the Convention determined not to deal with abortion in the Bill [Declaration] of Rights "at this time" and rather chose to leave the matter to the legislature because of the historical debate as to "when a person becomes a person". (page 1640)

- *"Roe, handed down a year after the Convention resolved this debate from the legal standpoint, concluding that a fetus does not enjoy a constitutionally protected status – i.e., that a fetus is not a constitutional person – until "viability" (at about 26 weeks or the third trimester).*

- **This opinion is controverted by Webster.**

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béysh(iy)ow èst/. It is in the nature of things that he who denies a fact is not bound to give proof.

Per saltum /pər sóltəm/. Lat. By a leap or bound; by a sudden movement; passing over certain proceedings.

Per sample /pər sǽmpəl/. By sample. A purchase so made is a collateral engagement that the goods shall be of a particular quality. U.C.C. § 2–313(1)(c).

Per se /pər síy/°séy/. Lat. By itself; in itself; taken alone; by means of itself; through itself; inherently; in isolation; unconnected with other matters; simply as such; in its own nature without reference to its relation.

In law of defamation, certain words and phrases that are actionable as slander or libel in and of themselves without proof of special damages, *e.g.* accusation of crime. Used in contrast to defamation per quod which requires proof of special damage. *See* Actionable per se; Libelous per se; Slanderous per se.

See also Negligence per se; Per se doctrine; Per se violations.

Persecutio /pərsəkyúwsh(iy)ow/. Lat. In the civil law, a following after; a pursuing at law; a suit or prosecution. Properly that kind of judicial proceeding before the prætor which was called "extraordinary." In a general sense, any judicial proceeding, including not only "actions" *(actiones),* properly so called, but other proceedings also.

Per se doctrine. Under the "per se doctrine," if an activity is blatant in its intent and pernicious in its effect, a court need not inquire into the reasonableness of the same before determining that it is a violation of the antitrust laws. Connecticut Ass'n of Clinical Laboratories v. Connecticut Blue Cross, Inc., 31 Conn.Sup. 10, 324 A.2d 288, 291. *See* Per se violations.

Persequi /pərsəkwày/. Lat. In the civil law, to follow after; to pursue or claim in form of law. An action is called a *"jus persequendi."*

Per se violations. In anti-trust law, term that implies that certain types of business agreements, such as price-fixing, are considered inherently anti-competitive and injurious to the public without any need to determine if the agreement has actually injured market competition. *See* Per se doctrine; Rule *(Rule of reason).*

Person. In general usage, a human being (*i.e.* natural person), though by statute term may include labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. See *e.g.* National Labor Relations Act, § 2(1), 29 U.S.C.A. § 152; Uniform Partnership Act, § 2.

Scope and delineation of term is necessary for determining those to whom Fourteenth Amendment of Constitution affords protection since this Amendment expressly applies to "person."

Aliens. Aliens are "persons" within meaning of Fourteenth Amendment and are thus protected by equal protection clause against discriminatory state action. Foley v. Connelie, D.C.N.Y., 419 F.Supp. 889, 891.

Bankruptcy Code. "Person" includes individual, partnership, and corporation, but not governmental unit. 11 U.S.C.A. § 101.

Commercial law. An individual or organization. U.C.C. § 1–201(30).

Corporation. A corporation is a "person" within meaning of Fourteenth Amendment equal protection and due process provisions of United States Constitution. Metropolitan Life Ins. Co. v. Ward, Ala., 470 U.S. 869, 105 S.Ct. 1676, 1683, 84 L.Ed.2d 751. The term "persons" in statute relating to conspiracy to commit offense against United States, or to defraud United States, or any agency, includes corporation. Alamo Fence Co. of Houston v. U.S., C.A.Tex., 240 F.2d 179, 181.

In corporate law, "person" includes individual and entity. Rev.Model Bus.Corp.Act, § 1.40.

Foreign government. Foreign governments otherwise eligible to sue in U.S. courts are "persons" entitled to bring treble-damage suit for alleged antitrust violations under Clayton Act, Section 4. Pfizer, Inc. v. Government of India, C.A.Minn., 550 F.2d 396.

Illegitimate child. Illegitimate children are "persons" within meaning of the Equal Protection Clause of the Fourteenth Amendment, Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436; and scope of wrongful death statute, Jordan v. Delta Drilling Co., Wyo., 541 P.2d 39, 48.

Interested person. Includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. Uniform Probate Code, § 1–201(20).

Labor unions. Labor unions are "persons" under the Sherman Act and the Clayton Act, Casey v. F.T.C., C.A.Wash., 578 F.2d 793, 797, and also under Bankruptcy Code, Highway and City Freight Drivers, Dockmen and Helpers, Local Union No. 600 v. Gordon Transports, Inc., C.A.Mo., 576 F.2d 1285, 1287.

Minors. Minors are "persons" under the United States Constitution, possessed of rights that governments must respect. In re Scott K., 24 C.3d 395, 155 Cal.Rptr. 671, 674, 595 P.2d 105.

Municipalities. Municipalities and other government units are "persons" within meaning of 42 U.S.C.A. § 1983. Local government officials sued in their official capacities are "persons" for purposes of Section 1983 in those cases in which a local government would be suable in its own name. Monell v. N. Y. City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611. *See* Color of law.

Definition of "person" or "persons" covered by antitrust laws includes cities, whether as municipal utility operators suing as plaintiffs seeking damages for antitrust violations or as operators being sued as defendants. City of Lafayette, La. v. Louisiana Power & Light Co., La., 435 U.S. 389, 98 S.Ct. 1123, 1128, 55 L.Ed.2d 364.

Protected person. One for whom a conservator has been appointed or other protective order has been made. Uniform Probate Code, § 5–103(18).

Resident alien. A resident alien is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. C. D. R. Enterprises, Ltd. v. Board of Ed. of City of New York, D.C. N.Y., 412 F.Supp. 1164, 1168.

Unborn child. Word "person" as used in the Fourteenth Amendment does not include the unborn. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 729, 35 L.Ed.2d 147. Unborn child is a "person" for purpose of remedies given for personal injuries, and child may sue after his birth. Weaks v. Mounter, 88 Nev. 118, 493 P.2d 1307, 1309. In some jurisdictions a viable fetus is considered a person within the meaning of the state's wrongful death statute, *e.g.* Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712, and within the meaning of the state's vehicular homicide statute, *e.g.* Comm. v. Cass, 392 Mass. 799, 467 N.E.2d 1324. *See also* Child; Children *(Rights of unborn child)*; Unborn child; Viable child.

University. A state university is a "person", within meaning of § 1983. 42 U.S.C.A. § 1983. Uberoi v. University of Colorado, Colo., 713 P.2d 894, 900.

Persona /pərsównə/. Lat. In the civil law, character in virtue of which certain rights belong to a man and certain duties are imposed upon him. Thus one man may unite many characters *(personæ)*, as, for example, the characters of father and son, of master and servant.

Personable /pə́rsənəbəl/. Having the rights and powers of a person; able to hold or maintain a plea in court; also capacity to take anything granted or given.

Persona conjuncta æquiparatur interesse proprio /pərsównə kənjə́ŋktə èkwəpəréytər intərésiy prówpriyow/. A personal connection [literally, a united person, union with a person] is equivalent to one's own interest; nearness of blood is as good a consideration as one's own interest.

Persona designata /pərsównə dèzəgnéytə/. A person pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character.

Persona ecclesiæ /pərsównə əklíyziyiy/. The parson or personation of the church.

Persona est homo cum statu quodam consideratus /pərsównə èst hówmow kəm stétyuw kwówdəm kənsìdəréytəs/. A person is a man considered with reference to a certain *status*.

Person aggrieved. To have standing as a "person aggrieved" under equal employment opportunities provisions of Civil Rights Act, or to assert rights under any federal regulatory statute, a plaintiff must show (1) that he has actually suffered an injury, and (2) that the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute in question. Foust v. Transamerica Corp., D.C.Cal., 391 F.Supp. 312, 314.

As contemplated by federal rule governing standing to object to alleged illegal search and seizure is one who is the victim of the search and seizure, as distinguished from one who claims prejudice only through the use of evidence gathered in a search directed at someone else. Cochran v. U.S., C.A.Colo., 389 F.2d 326, 327.

Test of whether a petitioner is a "person aggrieved" and thereby entitled to seek review of an order of referee in bankruptcy is whether his property may be diminished, his burden increased or his rights detrimentally affected by order sought to be reviewed. In re Capitano, D.C.La., 315 F.Supp. 105, 107, 108.

See also Aggrieved party; Standing to sue doctrine.

Personal. Appertaining to the person; belonging to an individual; limited to the person; having the nature or partaking of the qualities of human beings, or of movable property. In re Steimes' Estate, 150 Misc. 279, 270 N.Y.S. 339.

As to *personal* Action; Assets; Chattel; Contract; Covenant; Credit; Demand; Disability; Franchise; Injury; Judgment; Knowledge; Liberty; Notice; Obligation; Property; Replevin; Representative; Right; Security; Service; Servitude; Statute; Tax; Tithes; Tort; and Warranty, see those titles.

Personal belongings. In probate law, term is a broad classification and in absence of restriction may include most or all of the testator's personal property. Goggans v. Simmons, Tex.Civ.App., 319 S.W.2d 442, 445. *See also* Personal effects.

Personal defenses. In commercial law, term usually refers to defenses that cannot be asserted against a holder in due course in enforcing an instrument. Also refers to defenses of a principal debtor against a creditor that cannot be asserted derivatively by a surety.

Personal effects. Articles associated with person, as property having more or less intimate relation to person of possessor; "effects" meaning movable or chattel property of any kind. Usual reference is to such items as the following owned by a decedent at the time of death: clothing, furniture, jewelry, stamp and coin collections, silverware, china, crystal, cooking utensils, books, cars, televisions, radios, etc.

Term "personal effects" when employed in a will enjoys no settled technical meaning and, when used in its primary sense, without any qualifying words, ordinarily embraces such tangible property as is worn or carried about the person, or tangible property having some intimate relation to the person of the testator or testatrix; where it is required by the context within which the term appears, it may enjoy a broader meaning. In re Stengel's Estate, Mo.App., 557 S.W.2d 255, 260.

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Melvin ..... Aye
Monroe ..... Aye
Murray ..... Aye
Noble ..... Aye
Nutting ..... Excused
Payne ..... Aye
Pemberton ..... Nay
Rebal ..... Aye
Reichert ..... Aye
Robinson ..... Aye
Roeder ..... Aye
Rollins ..... Aye
Romney ..... Aye
Rygg ..... Aye
Scanlin ..... Absent
Schiltz ..... Aye
Siderius ..... Aye
Simon ..... Aye
Skari ..... Aye
Sparks ..... Aye
Speer ..... Aye
Studer ..... Aye
Sullivan ..... Aye
Swanberg ..... Aye
Toole ..... Aye
Van Buskirk ..... Aye
Vermillion ..... Aye
Wagner ..... Aye
Ward ..... Aye
Warden ..... Absent
Wilson ..... Aye
Woodmansey ..... Aye
Mr. Chairman ..... Aye

CLERK HANSON: Mr. Chairman, 79 delegates voting Aye, 7 voting No.

CHAIRMAN GRAYBILL: 79 delegates having voted Aye and 7 No, the amendment to add that phrase to Section 3 passes—or is adopted. Is there any other discussion of Section 3?

Mr. Kelleher.

DELEGATE KELLEHER: Mr. Chairman, I move to substitute the word "conceived" for the word "born" on line 25.

Mr. Chairman.

CHAIRMAN GRAYBILL: Just a minute, Mr. Kelleher. Since you didn't send that up, I have to write it out here.

DELEGATE KELLEHER: C-O-N-C-E-I-V-E-D.

CHAIRMAN GRAYBILL: B-O-R-N? Yes, Mr. Kelleher. Mr. Kelleher makes a motion to amend line 25 by striking the word "born" and putting in the word "conceived".

DELEGATE KELLEHER: Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Kelleher.

DELEGATE KELLEHER: My purpose in this is, what's the use of having rights of the living if I don't have the right to be born? A most defenseless human being in the world is the human fetus, which is dependent upon its own mother for protection. And lastly, I would leave to the courts the meaning of when a—quote—"person"—close quote—as used in line 25, is conceived.

CHAIRMAN GRAYBILL: Mr. Dahood.

DELEGATE DAHOOD: Mr. Chairman, I stand in opposition to the amendment. What Delegate Kelleher is attempting to do at this time is, by constitutional command, prohibit abortion in the State of Montana. That issue was brought before the committee. We decided that we should not deal with it within the Bill of Rights. It is a legislative matter insofar as we are concerned. The world of law has for centuries conducted a debate as to when a person becomes a person, at what particular state, at what particular time; and we submit that this particular question should not be decided by this delegation. It has no part at this time within the Bill of Rights of the Constitution of the State of Montana, and we oppose it for that reason.

CHAIRMAN GRAYBILL: Very well, Mr. Kelleher, you may close.

DELEGATE KELLEHER: May I have five seconds, please, for a roll call vote?

CHAIRMAN GRAYBILL: All right, we'll have a roll call vote. The question now arises on Mr. Kelleher's amendment to substitute the word "conceived" for the word "vote"—or for the word "born". So that the first sentence would read: "All persons are conceived free and have certain inalienable rights." So many as shall be in favor of Mr. Kelleher's motion, vote Aye; and so many as shall be opposed, vote No. Has every delegate voted?

(No response)

CHAIRMAN GRAYBILL: Does any delegate wish to change his vote?

(No response)

vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed, to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

AMENDMENT 13

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT 15

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any

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not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. Held:

1. While 28 U.S.C. 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 123.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 123-129.

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy [410 U.S. 113, 114] must exist at review stages and not simply when the action is initiated. Pp. 124-125.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. Samuels v. Mackell, 401 U.S. 66. Pp. 125-127.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 127-129.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 147-164.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 163, 164.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 163, 164.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 163-164; 164-165.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. P. 165.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling [410 U.S. 113, 115] that the Texas criminal abortion statutes are unconstitutional. P. 166.

314 F. Supp. 1217, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., post, p. 207, DOUGLAS, J., post, p. 209, and STEWART, J., post, p. 167, filed concurring opinions. WHITE, J.,

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struck down today was, as the majority notes, first enacted in 1857 and "has remained substantially unchanged to the present time." *Ante*, at 710.

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed. 220 (1886); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

For all of the foregoing reasons, I respectfully dissent.

5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).
10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1848).
21. Wisconsin (1858).

410 U.S. 179, 35 L.Ed.2d 201

Mary DOE et al., Appellants,

v.

Arthur K. BOLTON, as Attorney General of the State of Georgia, et al.

No. 70-40.

Argued Dec. 13, 1971.

Reargued Oct. 11, 1972.

Decided Jan. 22, 1973.

Rehearing Denied Feb. 26, 1973.

See 410 U.S. 959, 93 S.Ct. 1410.

Action was brought challenging validity of Georgia abortion statute. The United States District Court for the Northern District of Georgia, 319 F. Supp. 1048, as a three-judge court, rendered judgment holding portions of the statute invalid and plaintiffs appealed. The Supreme Court, Mr. Justice Blackmun, held that those portions of the statute requiring that abortions be conducted in hospitals, or accredited hospitals, requiring the interposition of a hospital abortion committee, requiring confirmation by other physicians, and limiting abortion to Georgia residents, are unconstitutional, while provision requiring that physician's decision rest upon his best clinical judgment of necessity is not unconstitutionally vague.

Judgment modified and affirmed.

Mr. Chief Justice Burger, Mr. Justice Douglas and Mr. Justice Stewart filed concurring opinions; Mr. Justice White dissented and filed an opinion in which Mr. Justice Rehnquist joined, and Mr. Justice Rehnquist dissented and filed an opinion.

1. Constitutional Law ⇐42.1(3)
Courts ⇐281

Pregnant Georgia citizen, on behalf of herself and others similarly situated,

Doe v Bolton

had standing to maintain action challenging Georgia abortion statutes, and presented justiciable controversy. Code Ga. §§ 26–1201 to 26–1203.

2. Courts ⇐281

Georgia-licensed doctors consulted by pregnant women presented justiciable controversy and had standing to maintain action challenging Georgia abortion statute although they had not been prosecuted or threatened with prosecution. Code Ga. §§ 26–1201 to 26–1203.

3. Appeal and Error ⇐843(2)

Supreme Court, which determined that pregnant woman and doctors had standing to challenge abortion statute, would not pass upon status of nurses, clergymen, and others who joined as plaintiffs.

4. Abortion ⇐1

Pregnant woman does not have absolute constitutional right to abortion on her demand.

5. Abortion ⇐1

State has right to readjust its views and emphases in light of advanced knowledge and techniques and fact that earlier Georgia abortion statute focused on preservation of woman's life did not prevent state from later justifying abortion statute in interest of protection of embryonic and fetal life.

6. Criminal Law ⇐13.1(2)

Provision of Georgia abortion statute making it a crime for a physician to perform an abortion except when it is based upon his best clinical judgment that abortion is necessary is not unconstitutionally vague, since his judgment may be made in light of all attendant circumstances. Code Ga. § 26–1202(a).

7. Abortion ⇐1
Constitutional Law ⇐208(1)

Provision of Georgia abortion statute requiring that abortions, unlike other surgical procedures, be done only in hospital accredited by private accreditation organization is invalid as not based on differences reasonably related to purposes of act in which it is found, in absence of showing that only hospitals (let alone those with accreditation) aid state's interest in fully protecting patient; while state may adopt standards for licensing all facilities where abortions, from and after end of first trimester of pregnancy, may be performed so long as these standards are legitimately related to state's objective, hospital requirement failing to exclude first trimester of pregnancy would be invalid on that ground alone. Code Ga. §§ 26–1201 to 26–1203; U.S.C.A.Const. Amend. 14.

8. Abortion ⇐1

Hospital requirement of Georgia abortion law is invalid for failure to exclude first trimester of pregnancy. Code Ga. §§ 26–1201 to 26–1203.

9. Abortion ⇐1

Georgia abortion statute requiring advance approval by hospital abortion committee lacks constitutionally justifiable pertinence and is unduly restrictive of patient's rights and needs which have already been medically delineated and substantiated by patient's personal physician. Code Ga. § 26–1202(b)(5), (e).

10. Abortion ⇐1

Under Georgia statutes, hospital is free not to admit patient for abortion and physician and any other employee has right to refrain, for moral or religious reasons, from participating in abortion procedure; these provisions sufficiently protect hospital and obviate need for abortion committee. Code Ga. § 26–1202(b)(5), (e).

11. Physicians and Surgeons ⇐2

Requirement of Georgia abortion statute that two Georgia licensed physicians confirm recommendation of pregnant woman's own consultant, a procedure not required in any other voluntary medical or surgical procedure, has no rational connection with patient's needs and unduly infringes on physician's right to practice. Code Ga. §§ 26–1201 to 26–1203.

12. Abortion ⇐1
Constitutional Law ⇐207(1)

Residency requirement of Georgia abortion law, not based on any policy of

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COURT CASES - ABORTION
Webster
v.
Reproductive Health Services

D

RECEIVED

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88–605. Argued April 26, 1989—Decided July 3, 1989

Appellees, state-employed health professionals and private nonprofit corporations providing abortion services, brought suit in the District Court for declaratory and injunctive relief challenging the constitutionality of a Missouri statute regulating the performance of abortions. The statute, *inter alia:* (1) sets forth "findings" in its preamble that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being," §§ 1.205.1(1), 1.205.1(2), and requires that all state laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court's precedents, § 1.205.2; (2) specifies that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is "viable" by performing "such medical examinations and tests as are necessary to make a finding of [the fetus'] gestational age, weight, and lung maturity," § 188.029; (3) prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, §§ 188.210, 188.215; and (4) makes it unlawful to use public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life, §§ 188.205, 188.210, 188.215. The District Court struck down each of the above provisions, among others, and enjoined their enforcement. The Court of Appeals affirmed, ruling that the provisions in question violated this Court's decisions in *Roe* v. *Wade*, 410 U. S. 113, and subsequent cases.

Syllabus

Held: The judgment is reversed.
851 F. 2d 1071, reversed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II–A, II–B, and II–C, concluding that:

1. This Court need not pass on the constitutionality of the Missouri statute's preamble. In invalidating the preamble, the Court of Appeals misconceived the meaning of the dictum in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 444, that "a State may not adopt one theory of when life begins to justify its regulation of abortions." That statement means only that a State could not "justify" any abortion regulation otherwise invalid under *Roe* v. *Wade* on the ground that it embodied the State's view about when life begins. The preamble does not by its terms regulate abortions or any other aspect of appellees' medical practice, and § 1.205.2 can be interpreted to do no more than offer protections to unborn children in tort and probate law, which is permissible under *Roe* v. *Wade*, *supra*, at 161–162. This Court has emphasized that *Roe* implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion, *Maher* v. *Roe*, 432 U. S. 464, 474, and the preamble can be read simply to express that sort of value judgment. The extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the state courts can definitively decide, and, until those courts have applied the preamble to restrict appellees' activities in some concrete way, it is inappropriate for federal courts to address its meaning. *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 460. Pp. 6–9.

2. The restrictions in §§ 188.210 and 188.215 of the Missouri statute on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions do not contravene this Court's abortion decisions. The Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual. *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. ——, ——. Thus, in *Maher* v. *Roe*, *supra*; *Poelker* v. *Doe*, 432 U. S. 519; and *Harris* v. *McRae*, 448 U. S. 297, this Court upheld governmental regulations withholding public funds for nontherapeutic abortions but allowing payments for medical services related to childbirth, recognizing that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate *Roe* v. *Wade*. A State may implement that same value judgment through the allocation of other public resources, such as hospitals and medical staff. There is no merit to the claim that *Maher*, *Poelker*, and *McRae* must be distinguished on the grounds that preventing access to a public

Syllabus

THE CHIEF JUSTICE, joined by JUSTICE WHITE and JUSTICE KENNEDY, concluded in Parts II–D and III that:

1. Section 188.029 of the Missouri statute—which specifies, in its first sentence, that a physician, before performing an abortion on a woman he has reason to believe is carrying an unborn child of 20 or more weeks gestational age, shall first determine if the unborn child is viable by using that degree of care, skill, and proficiency that is commonly exercised by practitioners in the field; but which then provides, in its second sentence, that, in making the viability determination, the physician shall perform such medical examinations and tests as are necessary to make a finding of the unborn child's gestational age, weight, and lung maturity—is constitutional, since it permissibly furthers the State's interest in protecting potential human life. Pp. 15–23.

STATES INTEREST IN PROTECTING HUMAN LIFE

(a) The Court of Appeals committed plain error in reading § 188.029 as requiring that after 20 weeks the specified tests *must* be performed. That section makes sense only if its second sentence is read to require only those tests that are useful in making subsidiary viability findings. Reading the sentence to require the tests *in all circumstances*, including when the physician's reasonable professional judgment indicates that they would be irrelevant to determining viability or even dangerous to the mother and the fetus, would conflict with the first sentence's *requirement* that the physician apply his reasonable professional skill and judgment. It would also be incongruous to read the provision, especially the word "necessary," to require tests irrelevant to the expressed statutory purpose of determining viability. Pp. 16–17.

(b) Section 188.029 is reasonably designed to ensure that abortions are not performed where the fetus is viable. The section's tests are intended to determine viability, the State having chosen viability as the point at which its interest in potential human life must be safeguarded. The section creates what is essentially a presumption of viability at 20 weeks, which the physician, prior to performing an abortion, must rebut with tests—including, if feasible, those for gestational age, fetal weight, and lung capacity—indicating that the fetus is not viable. While the District Court found that uncontradicted medical evidence established that a 20-week fetus is *not* viable, and that 23 1/2 to 24 weeks' gestation is the earliest point at which a reasonable possibility of viability exists, it also found that there may be a 4-week error in estimating gestational age, which supports testing at 20 weeks. Pp. 17–18.

VIABILITY — BY STATE SAFEGUARDED PRESUMED @ 20 WKS

(c) Section 188.029 conflicts with *Roe* v. *Wade* and cases following it. Since the section's tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were in fact second-trimester abortions. While *Roe*, 410 U. S., at 162, recognized the State's interest in protecting potential human life as "impor-

tant and legitimate," it also limited state involvement in second-trimester abortions to protecting maternal health, *id.*, at 164, and allowed States to regulate or proscribe abortions to protect the unborn child only after viability, *id.*, at 165. Since the tests in question regulate the physician's discretion in determining the viability of the fetus, § 188.029 conflicts with language in *Colautti* v. *Franklin*, 439 U. S. 379, 388–389, stating that the viability determination is, and must be, a matter for the responsible attending physician's judgment. And, in light of District Court findings that the tests increase the expenses of abortion, their validity may also be questioned under *Akron*, *supra*, at 434–435, which held that a requirement that second-trimester abortions be performed in hospitals was invalid because it substantially increased the expenses of those procedures. Pp. 17–19.

(d) The doubt cast on the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that *Roe*'s rigid trimester analysis has proved to be unsound in principle and unworkable in practice. In such circumstances, this Court does not refrain from reconsidering prior constitutional rulings, notwithstanding *stare decisis*. *E. g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528. The *Roe* framework is hardly consistent with the notion of a Constitution like ours that is cast in general terms and usually speaks in general principles. The framework's key elements—trimesters and viability—are not found in the Constitution's text, and, since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability. Thus, the *Roe* trimester framework should be abandoned. Pp. 19–21.

(e) There is no merit to the dissent's contention that the Court should join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as *Griswold* v. *Connecticut*, 381 U. S. 479. Unlike *Roe*, *Griswold* did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. The *Roe* framework sought to deal with areas of medical practice traditionally left to the States, and to balance once and for all, by reference only to the calendar, the State's interest in protecting potential human life against the claims of a pregnant woman to decide whether or not to abort. The Court's experience in applying *Roe* in later cases suggests that there is wisdom in not necessarily attempting to elaborate the differences between a "fundamental right" to

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an abortion, *Akron*, *supra*, at 420, n. 1, a "limited fundamental constitutional right," *post*, at 18, or a liberty interest protected by the Due Process Clause. Moreover, although this decision will undoubtedly allow more governmental regulation of abortion than was permissible before, the goal of constitutional adjudication is not to remove inexorably "politically devisive" issues from the ambit of the legislative process, but is, rather, to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. Furthermore, the suggestion that legislative bodies, in a Nation where more than half the population is female, will treat this decision as an invitation to enact abortion laws reminiscent of the dark ages misreads the decision and does scant justice to those who serve in such bodies and the people who elect them. Pp. 21–23.

Legislature

2. This case affords no occasion to disturb *Roe*'s holding that a Texas statute which criminalized *all* nontherapeutic abortions unconstitutionally infringed the right to an abortion derived from the Due Process Clause. *Roe* is distinguishable on its facts, since Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. P. 23.

Missouri has determined that viability is the point at which -- interest in potent human life must be safeguarded

JUSTICE O'CONNOR, agreeing that it was plain error for the Court of Appeals to interpret the second sentence of § 188.029 as meaning that doctors *must* perform tests to find gestational age, fetal weight, and lung maturity, concluded that the section was constitutional as properly interpreted by the plurality, and that the plurality should therefore not have proceeded to reconsider *Roe* v. *Wade*. This Court refrains from deciding constitutional questions where there is no need to do so, and generally does not formulate a consitutional rule broader than the precise facts to which it is to be applied. *Ashwander* v. *TVA*, 297 U. S. 288, 346, 347. Since appellees did not appeal the District Court's ruling that the first sentence of § 188.029 is constitutional, there is no dispute between the parties over the presumption of viability at 20 weeks created by that first sentence. Moreover, as properly interpreted by the plurality, the section's second sentence does nothing more than delineate means by which the unchallenged 20-week presumption may be overcome if those means are useful in determining viability and can be prudently employed. As so interpreted, the viability testing requirements do not conflict with any of the Court's abortion decisions. As the plurality recognizes, under its interpretation of § 188.029's second sentence, the viability testing requirements promote the State's interest in potential life. This Court has recognized that a State may promote that interest when viability is possible. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 770–771. Similarly, the basis for reliance by the lower courts on *Colautti* v. *Franklin*, 439 U. S. 379,

COURT CASES - ABORTION
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v.
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505 U.S. 833, 120 L.Ed.2d 674

833 PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al., Petitioners,

v.

Robert P. CASEY, et al., etc.

Robert P. CASEY, et al., etc., Petitioners,

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA et al.

Nos. 91-744, 91-902.

Argued April 22, 1992.

Decided June 29, 1992.

Abortion clinics and physician challenged, on due process grounds, the constitutionality of the 1988 and 1989 amendments to the Pennsylvania abortion statute. The United States District Court for the Eastern District of Pennsylvania, Daniel H. Huyett, 3d, J., 744 F.Supp. 1323, held that several sections of the statute were unconstitutional. Pennsylvania appealed. The Court of Appeals for the Third Circuit, 947 F.2d 682, affirmed in part and reversed in part. Certiorari was granted. The Supreme Court, Justices O'Connor, Kennedy and Souter held that: (1) the doctrine of stare decisis requires reaffirmance of *Roe v. Wade's* essential holding recognizing a woman's right to choose an abortion before fetal viability; (2) the undue burden test, rather than the trimester framework, should be used in evaluating abortion restrictions before viability; (3) the medical emergency definition in the Pennsylvania statute was sufficiently broad that it did not impose an undue burden; (4) the informed consent requirements, the 24-hour waiting period, parental consent provision, and the reporting and recordkeeping requirements of the Pennsylvania statute did not impose an undue burden; and (5) the spousal notification provision imposed an undue burden and was invalid.

Affirmed in part, reversed in part, and remanded.

Justice Stevens filed an opinion concurring in part and dissenting in part.

Justice Blackmun filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part.

Chief Justice Rehnquist filed an opinion concurring in the judgment in part and dissenting in part, in which Justices White, Scalia and Thomas joined.

Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Rehnquist and Justices White and Thomas joined.

1. Abortion and Birth Control ⇐.50

Woman has right to choose to have abortion before viability of fetus without undue interference from state; before viability, state's interests are not strong enough to support prohibition of abortion or imposition of substantial obstacle to woman's effective right to elect procedure. U.S.C.A. Const. Amend. 14.

before viability

2. Abortion and Birth Control ⇐.50

State has power to restrict abortions after fetal viability, if law contains exceptions for pregnancies that endanger woman's life or health. U.S.C.A. Const.Amend. 14.

after viability

3. Abortion and Birth Control ⇐.50

State has legitimate interests from the outset of the pregnancy in protecting health of woman and life of fetus that may become child. U.S.C.A. Const.Amend. 14.

state interest

4. Constitutional Law ⇐254.1

Substantive liberties protected by Fourteenth Amendment, which incorporates most of Bill of Rights against states, are not limited to those rights already guaranteed against federal interference by express provisions of first eight amendments to Constitution. U.S.C.A. Const.Amends. 1-8, 14.

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5. Constitutional Law ⇐254.1

Substantive liberties protected by Fourteenth Amendment are not limited to those practices, defined at the most specific level, that were protected against government interference by other rules of law when Fourteenth Amendment was ratified. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⇐254.1, 274(5)

Constitution places limits on state's right to interfere with person's most basic decisions about family and parenthood, as well as bodily integrity. U.S.C.A. Const.Amend. 14.

7. Courts ⇐89, 90(3)

Rule of stare decisis is not inexorable command and certainly it is not such in every constitutional case; rather, when Supreme Court reexamines prior holding, its judgment is customarily informed by prudential and pragmatic considerations designed to test consistency of overruling prior decision with ideal of the rule of law, and to gauge respective costs of reaffirming and overruling prior case.

8. Courts ⇐90(1)

Under doctrine of stare decisis, when Supreme Court reexamines prior holding, it may ask whether rule has proved to be intolerable simply in defying practical workability, whether rule is subject to a kind of reliance that would lend special hardship to consequences of overruling and would add inequity to cost of repudiation, whether related principles of law have so far developed that they have left the old rule no more than a remnant of abandoned doctrine, and whether facts have so changed or come to be seen differently as to have robbed old rule of significant application or justification.

9. Abortion and Birth Control ⇐.50
Courts ⇐90(1)

Opposition to *Roe v. Wade* did not render decision unworkable and, therefore, doctrine of stare decisis required reaffirmance.

10. Abortion and Birth Control ⇐.50
Courts ⇐90(1)

Reliance on *Roe v. Wade* rule's limitation on state power required reaffirmance of *Roe's* essential holding under doctrine of stare decisis; for two decades of economic and social developments, people organized intimate relationships and made choices that defined their views of themselves and their places in society in reliance on availability of abortion in event of contraceptive failure.

11. Abortion and Birth Control ⇐.50
Courts ⇐90(1)

No evolution of legal principle weakened doctrinal footings of *Roe v. Wade* and, therefore, application of stare decisis required reaffirmance, whether *Roe* was viewed as example of right of person to be free from unwarranted governmental intrusion into matters as fundamental as decision whether to bear or beget child, whether it was viewed as rule of personal autonomy and bodily integrity that would limit governmental power to mandate medical treatment or to bar its rejection, or if it was viewed as sui generis.

12. Abortion and Birth Control ⇐.50
Courts ⇐90(1)

Advances in maternal health care and in neonatal care that may have affected factual assumptions of *Roe v. Wade* did not render *Roe's* central holding obsolete and did not warrant overruling it; those facts had no bearing on validity of *Roe's* central holding that viability marked earliest point at which state's interest in fetal life would be constitutionally adequate to justify legislative ban on nontherapeutic abortions.

13. Abortion and Birth Control ⇐.50
Courts ⇐90(1)

Neither factual underpinnings of *Roe v. Wade*, nor Supreme Court's understanding of it, had been changed to such a degree that would warrant overruling decision; present doctrinal disposition to reach different result was insufficient to warrant overruling.

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VIABILITY

14. Abortion and Birth Control ⇐.50
Courts ⇐90(6)

Overruling *Roe v. Wade* in response to divisiveness of abortion issue would address error, if error there was, at cost of profound and unnecessary damage to Supreme Court's legitimacy, and to nation's commitment to rule of law; only the most convincing justification under accepted standards of precedent could suffice to demonstrate that overruling would be anything other than surrender to political pressure and unjustified repudiation of principle.

15. Abortion and Birth Control ⇐.50

Woman's constitutional liberty to terminate her pregnancy is not so unlimited as to prevent state from showing its concern for life of the unborn and, at later point in fetal development, state's interest in life may have sufficient force to allow restrictions on woman's right to terminate pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

16. Abortion and Birth Control ⇐.50

Viability is point of fetal development at which state's interest in life has sufficient force that woman's right to terminate her pregnancy may be restricted; viability is time at which there is realistic possibility of maintaining and nourishing life outside the womb, so that independent existence of second life can in reason and fairness be object of state protection that would override woman's right to terminate her pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

17. Abortion and Birth Control ⇐.50

Rigid trimester framework established in *Roe v. Wade* is not necessary to ensure that woman's right to choose to terminate or continue her pregnancy is not so subordinated to state's interest in fetal life that choice exists in theory but not in fact; rather, *Roe* recognizes state's interest in promoting fetal life and measures aimed at ensuring that woman's choice contemplates consequences for fetus do not necessarily interfere with right to terminate pregnancy, even if those measures would have been inconsistent with trimester framework. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const. Amend. 14.

18. Constitutional Law ⇐255(1)

Not every law which makes right more difficult to exercise is, ipso facto, an infringement of that right. U.S.C.A. Const.Amend. 14.

19. Abortion and Birth Control ⇐.50
Constitutional Law ⇐274(5)

Only when state regulation of abortion imposes undue burden on woman's ability to decide whether to terminate pregnancy does power of state reach into heart of liberty protected by due process clause; fact that regulation has incidental effect of making it more difficult or more expensive to procure abortion cannot be enough to invalidate it. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

20. Abortion and Birth Control ⇐.50

Undue burden standard is appropriate means of reconciling state's interest in human life with woman's constitutionally protected liberty to decide whether to terminate pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

21. Abortion and Birth Control ⇐.50

State regulation imposes "undue burden" on woman's decision whether to terminate pregnancy and, thus, regulation is invalid if it has purpose or effect of placing substantial obstacle in path of woman who seeks abortion of nonviable fetus. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

22. Abortion and Birth Control ⇐.50

Regulations which do no more than create structural mechanism by which state, or parent or guardian of minor, may express profound respect for life of unborn are per-

No SB 406 - McGee

MT SUPREME Court overturns US Supreme C

No. 98-066

IN THE SUPREME COURT OF THE STATE OF MONTANA

1999 MT 261

296 Mont. 361

989 P.2d 364

JAMES H. ARMSTRONG, M.D.; SUSAN CAHILL, P.A.; BARBARA POLSTEIN, D.O.; MINDY OPPER, P.A.; and BLUE MOUNTAIN CLINIC, on behalf of themselves and their patients throughout Montana, the surrounding states and Canada,

Plaintiffs and Respondents,

v.

THE STATE OF MONTANA and JOSEPH P. MAZUREK, in his official capacity as Attorney General for the State of Montana and his agents and successors,

Defendants and Appellants.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark,

No

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MT. Sup. Ct. - Armstrong

the time of conception. The government is wrong.

¶44.Significantly, the Convention determined *not* to deal with abortion in the Bill [Declaration] of Rights "at this time" and rather chose to leave the matter to the legislature because of the historical debate as to "when a person becomes a person." *See* comments of Delegate Dahood, Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1640. *Roe*, handed down a year after the Convention, resolved this debate from the legal standpoint, concluding that a fetus does not enjoy a constitutionally protected status--i.e., that a fetus is not a constitutional person--until "viability" (at about 26 weeks or the third trimester). *See Roe*, 410 U.S. at 160, 162-65, 93 S.Ct. at 730-33; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 87-90 (1996) (hereafter, Dworkin, *Freedom*).

¶45.Importantly, there is nothing in the Constitutional Convention debates which would logically lead to the conclusion that Article II, Section 10, does not protect, generally, the autonomy of the individual to make personal medical decisions and to seek medical care in partnership with a chosen health care provider free of government interference. Nor is there any reason to conclude, in light of *Roe* and post-*Roe* cases, that a woman's right to obtain a pre-viability abortion--part and parcel of her right of personal/procreative autonomy--likewise would not be encompassed within the protection of Montana's constitutional right of individual privacy. In fact, given the delegates' overriding concern that government not be allowed to interfere in matters generally considered private, and given the delegates' specific determination to adopt a broad and undefined right of individual privacy grounded in Montana's historical tradition of protecting personal autonomy and dignity, the opposite conclusion must be reached.

¶46.This determination is further supported by the Bill of Rights Committee's favorable reference to *Griswold v. Connecticut,* underlying its determination that the judicially-recognized right of privacy be elevated to explicit constitutional status. *See* Montana Constitutional Convention, Committee Proposals, February 22, 1972, p. 632. *Griswold* acknowledged the privacy interest inherent in contraception and procreation. *Griswold*, 381 U.S. at 485-86, 85 S.Ct. at 1162. Moreover, *Griswold* has been recognized to protect both "the individual interest in avoiding [accumulation and] disclosure of personal matters, and . . . the interest in independence in making certain kinds of important [personal] decisions," *Whalen v. Roe* (1977), 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64, including those "relating to marriage,

Historical Document

Resource Bank Contents

Dred Scott case: the Supreme Court decision

1857

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In March of 1857, the United States Supreme Court, led by Chief Justice Roger B. Taney, declared that all blacks -- slaves as well as free -- were not and could never become citizens of the United States. The court also declared the 1820 Missouri Compromise unconstitutional, thus permiting slavery in all of the country's territories.

The case before the court was that of *Dred Scott v. Sanford*. Dred Scott, a slave who had lived in the free state of Illinois and the free territory of Wisconsin before moving back to the slave state of Missouri, had appealed to the Supreme Court in hopes of being granted his freedom.

Taney -- a staunch supporter of slavery and intent on protecting southerners from northern aggression -- wrote in the Court's majority opinion that, because Scott was black, he was not a citizen and therefore had no right to sue. The framers of the Constitution, he wrote, believed that blacks "had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic, whenever profit could be made by it."

Referring to the language in the Declaration of Independence that includes the phrase, "all men are created equal," Taney reasoned that "it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration. . . ."

Abolitionists were incensed. Although disappointed, Frederick Douglass, found a bright side to the decision and announced, "my hopes were never

brighter than now." For Douglass, the decision would bring slavery to the attention of the nation and was a step toward slavery's ultimate destruction.

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